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**BEFORE THE
FEDERAL MARITIME COMMISSION**

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Docket No. 15-08

OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

GENERAL MOTORS LLC

Complainant,

v.

**NIPPON YUSEN KABUSHIKI KAISHA;
WALLENIUS WILHELMSSEN LOGISTICS AS; and
EUKOR CAR CARRIERS INC.**

Respondents.

**JOINT SUPPLEMENTAL MEMORANDUM REGARDING
JOINT MOTION TO STAY PROCEEDINGS**

As required by the Presiding Judge's October 21, 2015 order to file a joint supplemental memorandum regarding the joint motion to stay proceedings, complainant General Motors LLC ("GM") and the specially appearing named Respondents Nippon Yusen Kabushiki Kaisha ("NYK Japan"), Wallenius Wilhelmsen Logistics AS ("WWL Norway"), and EUKOR Car Carriers, Inc. ("EUKOR") (NYK Japan, WWL Norway and EUKOR collectively are referred to as "respondents"), hereby file their joint supplemental memorandum in support of their joint motion to stay.

GM and respondents respectfully submit that all of the factors relevant to an application for a stay support granting the parties' joint motion.

I. BACKGROUND.

On May 24, 2013, the first of what later would become a number of cases was filed in the United States District Court for the District of New Jersey alleging that a number of ocean carriers had combined and conspired to artificially inflate the cost of the ocean carriage of vehicles. [D.N.J. Docket No. 2-13-cv-3306-ES-JAD, D.E. No. 1.] Given the number and similarity of the actions filed, on October 23, 2013, the Judicial Panel on Multidistrict Litigation (“JPML”) ordered that all matters on this subject be consolidated into MDL No. 2471, assigned to the Hon. Esther Salas, Judge of the United States District Court for the District of New Jersey. [D.N.J. Docket No. 2-13-cv-3306-ES-JAD, D.E. No. 21.] By an order dated December 27, 2013, Judge Salas (a) ordered consolidation of the matters referred by the JPML, (b) established a Master Docket Number for the consolidated cases, and (c) set the date for an initial case management conference. [D.N.J. Docket No. 2-13-cv-3306-ES-JAD, D.E. No. 48.]

On January 31, 2014, the initial case management conference was held before Judge Salas. [D.N.J. Docket No. 2-13-cv-3306-ES-JAD, D.E. No. 84.] Various organizational events occurred thereafter.

On January 26, 2015, several perfected motion packages – consisting of motions, oppositions and replies – were filed before Judge Salas. In relevant part, they included

- (a) a motion on behalf of all defendants to dismiss all three of the indirect purchaser complaints [D.N.J. Docket No. 2-13-cv-3306-ES-JAD, D.E. Nos. 209, 210, 211, 251 and 252]; and,
- (b) a motion on behalf of all defendants to dismiss the direct purchasers’ complaint [D.N.J. Docket No. 2-13-cv-3306-ES-JAD, D.E. Nos. 218, 219 and 220]

On June 15, 2015, GM filed its action against respondents in the United States District Court for the Eastern District of New York. [E.D.N.Y. Docket No. 1-15-cv-3451, D.E.

No. 1.] On June 19, 2015, and in compliance with the earlier order of the JPML consolidating these matters before Judge Salas in New Jersey, GM filed its notice of “tag-along.” [E.D.N.Y. Docket No. 1-15-cv-3451, D.E. No. 5.] On June 29, 2015, the JPML issued its transfer order, consolidating GM’s June 15, 2015 complaint with MDL No. 2471 pending before Judge Salas for pretrial proceedings. [MDL No. 2471, D.E. No. 166.] Some non-dispositive motion practice ensued, but the Court’s focus was on the then pending motions to dismiss the class complaints.

On July 23, 2015, Judge Salas heard argument on the motions to dismiss the class complaints. [D.N.J. Docket No. 2-13-cv-3306-ES-JAD, D.E. No. 267.]¹ By an August 28, 2015 opinion and order, Judge Salas dismissed with prejudice the direct purchasers’ consolidated amended complaint and all three of the indirect purchasers’ consolidated amended complaint, ruling that any claims asserted in those actions had to be presented to the Federal Maritime Commission (“FMC”) for resolution under the Shipping Act. [D.N.J. Docket No. 2-13-cv-3306-ES-JAD, D.E. Nos. 275 and 276.] The direct purchaser plaintiffs and the indirect purchaser plaintiffs have filed notices of appeal to the U.S. Court of Appeals for the Third Circuit; those appeals have been consolidated and stayed pending the disposition of a motion for reconsideration filed by the indirect purchaser plaintiffs.²

On September 2, 2015, GM filed its protective complaint before the FMC because of upcoming statute of limitations deadlines. [FMC Docket No. 15-08.] On September 21,

¹ GM did not participate in those motions and arguments because, given the date on which GM filed its district court complaint, it had not yet had the opportunity to brief any of the issues related to the motions to dismiss.

² That reconsideration motion requests that, despite the dismissal of the underlying indirect purchaser complaints, Judge Salas nevertheless retain jurisdiction in order to effectuate settlements reached between the indirect purchaser plaintiffs and two sets of defendants other than NYK, WWL or EUKOR. [D.N.J. Docket No. 2-13-cv-3306-ES-JAD, D.E. Nos. 277 and 278.]

2015, GM and respondents filed a joint motion to stay proceedings before the FMC. In parallel, and because Judge Salas's August 28, 2015 opinion and order did not address GM's district court complaint, a conference was conducted "to discuss the status of the claims at issue in Civil Action No. 15-4739 following the Hon. Esther Salas, U.S.D.J.'s 8/28/15 Opinion and Order in these consolidated matters." [D.N.J. Docket No. 2-13-cv-3306-ES-JAD, D.E. No. 279.] That conference resulted in the setting of a briefing schedule to address the applicability of Judge Salas's August 28, 2015 opinion and order, if any, to GM's complaint. [D.N.J. Docket No. 2-15-cv-4739-ES-JAD, D.E. No. 20.] On October 23, 2015, GM filed a letter brief setting forth those arguments. [D.N.J. Docket No. 2-15-cv-4739-ES-JAD, D.E. No. 21.] Respondents' opposition is not due until November 24, 2015. [*Ibid.*] The text order does not provide for any reply briefs. [D.N.J. Docket No. 2-15-cv-4739-ES-JAD, D.E. No. 20.]

In the interim, by an order dated October 21, 2015, the Presiding Judge directed that the parties "file a joint supplemental memorandum fully addressing all factors to be considered in deciding the motion to stay, including whether any parties or the public interest will be harmed by a stay and the Commission's interest in resolving controversies efficiently." Order dated October 21, 2015, at 3. The Presiding Judge further directed that "the parties should discuss the current status of the federal court litigation." *Ibid.*

This joint supplemental memorandum followed.

II. ANALYSIS.

A. Standard of review.

The Presiding Judge's October 21, 2015 order specifically notes that the factors relevant to a motion to stay pending the outcome of another proceeding include "which court first assumed jurisdiction, the inconvenience of the federal forum, the desirability of avoiding

piecemeal litigation, whether state or federal law provides the rule of decision on the merits, the adequacy of the state court to protect the parties' rights, and whether one of the actions has a vexations or reactive nature.” *Id.* at 2 (quoting *Profile Manufacturing, Inc. v. Ronald Kress*, 1994 U.S. App. LEXIS 6048, at *7 (Fed. Cir. 1994). That order further notes that “[t]he parties should address whether these, or other factors, should be considered by the Commission in determining whether or not to stay this proceeding due to the parallel federal court proceeding.” *Ibid.*

GM and respondents respectfully submit that there are other relevant factors to be considered. They are: the stage of the litigation; whether the non-moving party will be unduly prejudiced or tactically disadvantaged by a stay; and whether a stay will simplify issues. *See Board of Trustees of the Ohio Laborers' Fringe Benefit Programs v. O.C.I. Construction, Inc.*, No. 2:10-cv-550, 2011 WL 902246 at *3 (S.D. Ohio Mar. 14, 2011); *Washington Mutual Bank v. Law Office of Robert Jay Gumenick*, 561 F. Supp. 2d 410 (S.D.N.Y. 2008); *Auto-Owners Ins. Co. v. Summit Park Townhouse Ass'n*, No. 14-cv-3417, 2015 WL 1740818 (D. Colo. Apr. 14, 2015); *Woodman's Food Market, Inc. v. Clorox Co.*, No. 14-cv-734, 2015 WL 4858396 (W.D. Wis. Aug. 13, 2015).

It is respectfully submitted that each of those factors favors the stay requested by GM and respondents; each is examined individually.

1. **The “first-filed” court/status of the district court litigation.** As noted above, the district court has established a process and schedule that allows GM to address the applicability of Judge Salas's August 28, 2015 opinion and order, if any, to GM's complaint. Once all briefing is completed, the district court will decide whether any of GM's claims can proceed in district court. That decision will clarify two fundamental questions: the nature of

GM's claims, if any, against respondents, and the proper forum for adjudicating those claims.³

In short, the status of the district court litigation supports a stay. *See Royal Park Investments SA/NV v. Bank of America Corp.*, 941 F. Supp. 2d 367 (S.D.N.Y. 2013) (holding that stay was warranted in part by fact that other tribunal was expected to rule in near future).

More specifically, on June 15, 2015, the district court first assumed jurisdiction when GM filed its action; GM did not file before the FMC until September 2, 2015, and then solely as a protective measure. In the aggregate, this factor supports a stay in favor of the earlier filed district court action. *See Signal International, LLC v. LeTourneau, Inc.*, No. H-07-2915, 2008 WL 239655 (S.D. Tex. Jan. 29, 2008) (staying action in favor of earlier filed case).

2. **The convenience of the forum.** The District Court in New Jersey is a more convenient forum because EUKOR maintains an office in New Jersey and NYK Japan and WWL Norway each has wholly-owned subsidiaries headquartered in New Jersey. [GM District Court Compl. ¶¶ 221-22, 24, 25].⁴ None of respondents have offices in the District of Columbia. This factor supports a stay.

3. **The desirability of avoiding piecemeal litigation.** If the parties are required to simultaneously litigate the same issues before the district court and before the FMC, duplicative litigation will result. The factual allegations of the complaint filed by GM in the district court and the reparations complaint filed in the FMC are the same. This factor also supports a stay. *See In re Groupon Derivative Litigation*, 882 F. Supp. 2d 1043 (N.D. Ill. 2012) (staying action in part to avoid piecemeal litigation and attendant burdens on court and parties).

³ Although the parties certainly cannot bind the district court, it is reasonably expected that the district court's decision will follow shortly after the close of the briefing.

⁴ GM's complaint in the district court is attached as Exhibit A to the joint motion to stay filed on September 21, 2015.

4. **The law providing the rule of decision on the merits.** Until the district court renders its decision on GM's complaint, it remains unclear whether the federal antitrust laws, the Shipping Act, or New York statutory or common law will provide the rule of decision on GM's claims. Only the district court can determine if it has jurisdiction over GM's claims. This factor also supports a stay.

5. **The adequacy of the forum to protect the parties' rights.** GM believes that the district court is better able to apply certain laws that are part of GM's claim, and thus protect GM's rights. Thus, in GM's view, this factor weighs in favor of a stay. Respondents are of the view that both the district court and the FMC will protect the parties' rights and, hence, this factor is neutral.

6. **Whether one of the actions is vexatious or reactive in nature.** Neither action is vexatious: GM filed its complaint in the FMC only as a protective action to preserve the statute of limitation for reparations claims, if any, under the Shipping Act. [Sept. 21, 2014 Joint Motion ¶¶ 3-4]. The protective nature of GM's filing supports a stay of the instant action. *See PDL Biopharma, Inc. v. Sun Pharmaceutical Industries, Ltd.*, No. 07-11709, 2007 WL 2261386 at *2 (E.D. Mich. Aug. 6, 2007) (staying second-filed protective action).

7. **Whether the parties or the public interest will be harmed by a stay.** The parties will benefit from a stay by avoiding costly and time-consuming duplicative litigation; that is why the parties jointly have moved for a stay. The public interest likewise will benefit from a stay because the time and resources of the district court and the FMC will not be consumed by duplicative litigation. Ultimately, only one of these cases will proceed; nothing is gained, and much is lost, by having the two cases proceed simultaneously.

8. The Commission's interest in resolving controversies efficiently.

Unless and until it is determined in which forum GM will go forward with its complaint – a determination that hinges on whether GM's district court case may proceed before Judge Salas – it is inefficient and wasteful to consume the time and resources of the Commission in this action. Abiding that determination is in the best interests of the Commission's adjudicative goals.

9. The stage of the litigation. Although both GM's district court complaint and its FMC complaint are in their preliminary stages, the parties already have engaged in dispositive motion practice in the district court. This factor is in equipoise, if not in favor of a stay. *See Generac Power Systems, Inc. v. Kohler Co.*, 807 F. Supp. 2d 791 (E.D. Wis. 2011) (granting stay based in part early stage of litigation being stayed).

10. Whether the non-moving party will be unduly prejudiced or tactically disadvantaged by a stay. This factor is irrelevant; the parties have filed a joint motion for a stay and, as a result, no party will be unduly prejudiced or tactically disadvantaged by a stay. *See Halim v. United States*, 106 Fed. Cl. 677 (2012) (staying action where all parties moved for stay).

11. Whether a stay will simplify issues. A stay will simplify issues because the district court's decision on GM's complaint could eliminate the need for an FMC action or further streamline GM's claims against respondents. *See Saipan Shipping Co., Inc. v. Asiatic Intermodal Seabridge, S.A.*, 19 S.R.R. 900 (ALJ, 1979) (granting stay where decision in parallel proceeding was likely to either "eliminate the need for a determination of the issues in this proceeding" or have a "strong and direct bearing on the issues in this case"). This factor too supports the issuance of a stay.

III. CONCLUSION.

The overwhelming majority of the factors relevant to the parties' joint motion for a stay support the relief requested; to the extent there are any remaining factors, they are either irrelevant or neutral. Viewed objectively, this application is no different than any other motion to stay filed in any other first-filed vs. protective action context. In those instances, the application to stay the protective action is consistently and universally granted. "As between federal [] courts . . . the general principle is to avoid duplicative litigation." *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976).

For the foregoing authority, arguments, and reasons, the parties respectfully request that their joint motion to stay proceedings be granted pending a resolution by the district court as to GM's complaint, and that an appropriate order be entered staying this action, and all associated proceedings and deadlines. Every 90 days, the parties will file a written status report updating the Presiding Judge on the district court proceedings.

DATED: November 12, 2015

Respectfully submitted,



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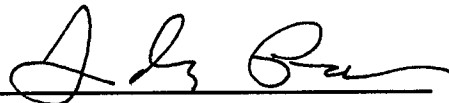
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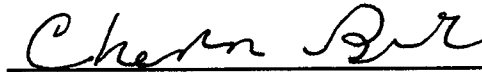
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on all parties of record by electronic mail, and submitted a copy via U.S. mail to each such person.

DATED: November 12, 2015



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